TETUAN THESELIM MOHD SAHAL & CO & ORS v. TAN BOON HUAT & ANOR

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
HASNAH MOHAMMED HASHIM JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1494-09-2015]
20 MARCH 2017

CONTRACT: *Agreement – Sale and purchase agreement – Termination – Whether purchasers' losses attributed to solicitor's negligence – Whether losses caused by purchasers' failure to obtain financing within agreed time period – Whether solicitor complied with instructions of purchasers*

TORT: *Negligence – Professional negligence – Solicitors in conveyancing practice – Termination of sale and purchase agreement – Whether caused by solicitor's negligence – Standard of care expected of solicitors – Whether evidence adduced to show degree of care and skill expected of a competent and reasonably experienced solicitor – Whether causal connection established – Whether solicitor guilty of unprofessional conduct*

Sometime in 2005, the respondents ('plaintiffs') appointed the first appellant ('the first defendant'), a legal firm, to prepare a sale and purchase agreement ('SPA') for a property in Kota Damansara, Selangor ('the said property'), whereby the plaintiffs were the purchasers of the said property for a purchase price of RM2,200,000. The plaintiffs concluded the SPA and in consideration paid a sum of RM190,000 as deposit to the vendor. The first defendant took steps to implement the SPA and informed the plaintiffs of the completion and the extended completion dates of the SPA were 26 May 2006 and 26 June 2006 respectively. In the meantime, the plaintiffs obtained a letter of offer for a loan facility to finance the purchase of the property. However, they sought variation of the terms and conditions imposed by the bank and the final mutual approved terms and conditions for the facility was reached between the plaintiffs and the bank sometime on 30 June 2006. The vendor did not agree to grant any further extension of time to the plaintiffs after 26 June 2006 despite repeated requests from the first defendant on behalf of the plaintiffs and thus, terminated the SPA on 30 June 2006 and forfeited the deposit. Hence, the plaintiffs filed a suit alleging negligence on the part of the defendants which the defendants denied. The High Court found that the first and second defendants were in breach of their duty of care towards the plaintiffs on grounds, *inter alia*, that (i) the second defendant had failed to incorporate the plaintiffs' comments into the final SPA between the vendor and the plaintiffs; and (ii) the second defendant had failed to comply with the plaintiffs' instruction to terminate the SPA. Hence, this appeal by the defendants.

Held (allowing appeal; setting aside order of High Court)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The contemporaneous documents showed that the plaintiffs were no longer interested in the termination of the SPA but instead took positive steps to proceed with the SPA. Having elected to proceed with the SPA, the plaintiffs were estopped from alleging that the defendants were negligent for not complying with their instructions to terminate the SPA. Only after a further extension of time was refused by the vendor that the allegations of failure to put in the necessary terms and the failure to terminate the SPA were mounted against the defendants. (paras 20 & 21)

(2) Having decided to affirm the contract and taking steps to conclude the said contract by obtaining the necessary financing, the plaintiffs were deemed to have abandoned their rights by making such an election. The plaintiffs could not fall back on the alleged negligence of their solicitors, the first defendant, to claim for subsequent losses that arose due to the plaintiffs' election to continue with the contract. (paras 22 & 23)

(3) It is trite law that parties must confine their case to the pleadings and the parties are bound by their pleadings. A perusal of the pleadings indicated that the finding of the trial judge was based on an unpleaded allegation of negligence. Such finding had occasioned a miscarriage of justice and the decision must be set aside. (paras 26 & 27)

(4) A solicitor, like all professionals, has a duty to exercise reasonable degree of care and skill expected of a competent and reasonably experienced solicitor. However, no evidence was adduced to show the appropriate standard of care, competence and diligence which the defendants should be held up to in conveyancing practice. There was also no material before the court to rule that the second defendant was guilty of unprofessional conduct. The finding of negligence in this context was therefore unfortunate. (paras 29 & 31)

(5) The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. Applying the 'but for' test, the question was whether the plaintiffs' damage would have accrued but for the defendants' negligence. The proximate cause of the plaintiffs' losses was the failure of the plaintiffs to obtain the financing and to settle the balance purchase price within the agreed period, a matter entirely within the control of the plaintiffs and the bank. There was no nexus between the exercise of care and skill by the defendants as solicitors to the granting or otherwise of the loan facility. It followed that the plaintiffs had failed to establish liability on the part of the defendants. (paras 32 & 33)

(6) The decision of the High Court was plainly wrong. There had been a clear case of misdirection by the trial judge on the issue of liability warranting appellate intervention. (para 34)

***Bahasa Malaysia** Headnotes*

Pada tahun 2005, responden-responden ('plaintif-plaintif') melantik perayu pertama ('defendan pertama'), sebuah firma guaman, untuk menyediakan perjanjian jual beli ('PJB') bagi sebuah hartanah di Kota Damansara, Selangor, di mana plaintif-plaintif adalah pembeli hartanah tersebut pada harga belian RM2,200,000. Plaintif-plaintif menamatkan PJB dan membayar deposit RM190,000 sebagai balasan kepada penjual. Defendan pertama mengambil langkah-langkah untuk melaksanakan PJB tersebut dan memaklumkan plaintif-plaintif bahawa tarikh-tarikh penyelesaian dan lanjutan penyelesaian masing-masing adalah 26 Mei 2006 dan 26 Jun 2006. Pada masa yang sama, plaintif-plaintif memperoleh surat tawaran bagi kemudahan pinjaman bagi membiayai pembelian hartanah tersebut. Walau bagaimanapun, mereka memohon berbagai variasi terma-terma dan syarat-syarat yang dikenakan bank dan terma-terma dan syarat-syarat muktamad bersama yang diluluskan bagi kemudahan tersebut dicapai antara plaintif-plaintif dan bank kira-kira pada 30 Jun 2006. Penjual tidak bersetuju untuk memberikan lanjutan masa kepada plaintif-plaintif selepas 26 Jun 2006 walaupun dipohon berkali-kali oleh defendan pertama bagi pihak plaintif-plaintif dan dengan itu menamatkan PJB pada 30 Jun 2006 dan merampas wang deposit. Oleh itu, plaintif-plaintif memfailkan guaman mendakwa kecuaian oleh defendan-defendan, yang dinafikan defendan-defendan. Mahkamah Tinggi mendapati defendan-defendan pertama dan kedua melanggar kewajipan berjaga-jaga mereka terhadap plaintif-plaintif atas alasan-alasan, antara lain, bahawa (i) defendan kedua gagal memasukkan komen plaintif-plaintif dalam PJB terakhir antara penjual dan plaintif-plaintif; dan (ii) defendan kedua gagal mematuhi arahan plaintif-plaintif untuk menamatkan PJB. Oleh itu, rayuan ini oleh defendan-defendan.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Dokumen-dokumen semasa menunjukkan bahawa plaintif-plaintif tidak lagi berminat dalam penamatan PJB tetapi sebaliknya mengambil langkah-langkah positif untuk meneruskan dengan PJB. Selepas memilih untuk meneruskan dengan PJB, plaintif-plaintif diestop daripada mendakwa bahawa defendan-defendan cuai kerana tidak mematuhi arahan mereka untuk menamatkan PJB. Hanya selepas lanjutan masa lebihan dinafikan oleh penjual, dakwaan kegagalan memasukkan terma-terma perlu dan kegagalan membatalkan PJB dibangkitkan terhadap defendan-defendan.

(2) Selepas memutuskan untuk mengesahkan kontrak dan mengambil langkah-langkah untuk menyelesaikan kontrak dengan memperoleh pembiayaan yang diperlukan, plaintif-plaintif dianggap mengabaikan hak-hak mereka untuk membuat pilihan tersebut. Plaintif-plaintif tidak boleh menyandar atas dakwaan kecuaian peguam cara mereka, defendan

pertama, untuk menuntut kerugian yang dialami kemudiannya berikutan pilihan yang dibuat oleh plaintif-plaintif untuk meneruskan dengan kontrak tersebut.

(3) Adalah undang-undang matan bahawa pihak-pihak mesti membatasi kes mereka pada pliding dan pihak-pihak terikat dengan pliding mereka. Penilaian pliding-pliding menunjukkan bahawa dapatan hakim bicara adalah berdasarkan dakwaan kecuaian yang tidak diplid. Dapatan sedemikian mengakibatkan salah laksana keadilan dan keputusan tersebut harus diketepikan.

(4) Seorang peguam cara, seperti semua profesional, mempunyai kewajipan melaksanakan tahap berjaga-jaga dan kemahiran yang dijangka oleh peguamara yang kompeten dan berpengalaman secara munasabah. Walau bagaimanapun, tiada keterangan dikemukakan untuk menunjukkan standard berjaga-jaga yang wajar, kompeten dan kerajinan yang wajar diamalkan oleh defendan-defendan dalam amalan pemindahhakan. Tiada perkara di hadapan mahkamah untuk memerintahkan bahawa defendan kedua bersalah atas tindakan tidak berprofesional. Oleh itu, dapatan kecuaian dalam konteks ini adalah tidak wajar.

(5) Undang-undang memerlukan kaitan penyebab antara pelanggaran kewajipan dan kerugian yang dialami sebelum liabiliti dibuktikan dalam tindakan kecuaian. Menggunakan ujian 'but for', persoalan adalah sama ada kerugian plaintif-plaintif terakru jika bukan kerana kecuaian defendan-defendan. Sebab langsung kerugian plaintif-plaintif adalah kegagalan plaintif-plaintif mendapatkan pembiayaan dan menyelesaikan baki harga belian dalam tempoh yang dipersetujui, satu perkara dalam kawalan plaintif-plaintif dan bank. Tiada kaitan antara pelaksanaan kewajipan berjaga-jaga dan kemahiran oleh defendan-defendan sebagai peguam cara dalam pemberian atau sebaliknya kemudahan pinjaman. Justeru, plaintif-plaintif gagal membuktikan liabiliti pada pihak defendan-defendan.

(6) Keputusan Mahkamah Tinggi jelas khilaf. Wujud kes salah arahan yang jelas oleh hakim bicara atas isu liabiliti yang mewajarkan campur tangan rayuan.

Case(s) referred to:

Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd [2014] 5 CLJ 533 CA ***(refd)***

Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors & Other Appeals [2012] 7 CLJ 337 CA ***(refd)***

Elizabeth Chin Yew Kim & Anor v. Dato' Ong Gim Huat & Other Appeals [2017] 2 CLJ 274 CA ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Ngan Siong Hing v. RHB Bank Bhd [2014] 3 CLJ 984 CA ***(refd)***

Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd [2016] 10 CLJ 112 CA ***(refd)***

Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co [2010] 1 CLJ 913 HC ***(refd)***

Vershures Creameries Ltd v. Hull and Netherlands Steamship Co Ltd [1921] 2 KB 608 ***(refd)***

Other source(s) referred to:

Chitty on Contracts, vol 1, 31st edn, para 24-003

For the appellants - S Murthi & Ahmad Hanafi Lop Ahmad; M/s Theselim Mohd Yusoff & Co

For the respondent - Zahiah Nasir; M/s Zahia Nasir & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-761-06-2012 (overruled).]

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This is an appeal against the decision of the High Court at Kuala Lumpur delivered on 10 July 2015 after a full trial. The written grounds of judgment of the learned judge is dated 12 April 2016. The High Court had allowed the respondent's claims for professional negligence. The defendants were found jointly and severally liable for negligence and were awarded special damages of RM190,000 and general damages of RM2 million together with interest and costs fixed at RM30,000.

[2] This appeal was heard on 15 August 2016. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow. For convenience the parties will be referred to as they were in the High Court.

Background Facts

[3] The relevant facts giving rise to the civil suit can be stated as follows. The first plaintiff is the husband of Lim Ah Kim, the second plaintiff. On 5 August 2013, after this suit was filed, Lim Ah Kim passed away due to cancer. The first plaintiff duly obtained the grant of probate for his late wife's estate. The pleadings were accordingly amended to substitute the first plaintiff for the second plaintiff in his capacity as representative of the estate.

[4] The first defendant was a legal firm. It had two partners, the second and third defendants. The firm has since been dissolved on or around February 2015. At the material time, the second and third defendants operated separate branches and were not involved in each other's practice.

[5] Sometime in 2005, the plaintiffs appointed the first defendant to prepare a sales and purchase agreement ("SPA") for a property known as No. 1, Botanic Villa, Jalan 1, Kenyalang 11/6, Kota Damansara, Selangor Darul Ehsan ("the property"), whereby the plaintiffs were the purchasers of the said property for a purchase price of RM2,200,000.

[6] The plaintiffs concluded the SPA with the vendor on 10 January 2005. In consideration, the plaintiffs paid a sum of RM190,000 as deposit to the vendor. The first defendant took steps to implement the SPA, *inter alia,* by obtaining the consent to transfer the property, submitting the memorandum of transfer for adjudication, and advising the plaintiffs of the timelines. After

A the first defendant obtained the consent to transfer the property, the plaintiffs were informed of the completion and the extended completion dates of the SPA, namely, 26 May 2006 and 26 June 2006 respectively.

[7] Meanwhile, the plaintiffs had applied for a loan from a bank to finance the purchase of the said property. The said bank, Bumiputra Commerce Bank B (now CIMB Bank) ("the bank"), had made several offers to the plaintiffs in respect of their applications. While initially the plaintiffs had obtained a letter of offer for a loan facility in 2004, the plaintiffs sought for a variation of the terms and conditions imposed by the bank after the plaintiffs concluded the SPA on 10 January 2005. Thereafter, there were various C amendments to the bank's letters of offer, and finally a mutually approved terms and conditions for the facility was reached between the plaintiffs and the bank sometime on 30 June 2006.

[8] This meant that the plaintiffs had failed to secure a bank loan to pay the balance purchase price within the stipulated time period to complete the D SPA. Unfortunately for the plaintiffs, the vendor did not agree to grant any further extension of time to the plaintiffs after the extended completion date despite repeated requests from the first defendant on behalf of the plaintiffs. The bank, by way of its letter dated 30 June 2006, issued instructions to the first defendant to prepare the loan documentations for the plaintiffs but this E was after the expiry of the extended completion date on 26 June 2006.

[9] Not surprisingly, since no extension was granted to pay the balance purchase price, the vendor terminated the SPA on 30 June 2006. The reason given was the plaintiffs' failure to make full payment of the balance purchase price before the expiry of the extended completion date of 26 June 2006. The F vendor then forfeited the plaintiffs' deposit of RM190,000.

[10] Thereafter, the plaintiffs made allegations of negligence against the first defendant for causing losses to the plaintiffs from the mismanagement of the SPA resulting in its termination. In order to better appreciate the arguments of the parties, a tabulated chronology of events based on the trial G documents, was provided to the court as shown below:

	Date	Particulars
1.	25.11.2004	Loan Offer Letter from Bumiputra Commerce Bank Berhad ("BCB") to Respondents ("1st Loan Offer") Loan Amount: RM2,200,000.00 Property: Lot No. 1 Botanic Villa Jalan Kenyalang 11/6, Kota Damansara, 47810 Petaling Jaya, Selangor Darul Ehsan ("Property") Respondents' Date of Acceptance: Undated
2.	10.01.2005	Stamped Sale and Purchase Agreement between Kang Tian Lye (as the Vendor) and respondents (as the Purchasers) for the purchase of the Property ("Agreement").

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3.	16.05.2005	Respondents' letter to BCB to request a revision of the terms of the BCB's 1st Loan Offer *inter alia:* (a) Removal of Commerce Investment Guarantee 3 (CIG3) of RM700,000.00 by the Respondents to BCB; and (b) Revision of interest rate stipulated by BCB for the loan.
4.	18.10.2005	Partnership Agreement between 2nd appellant, SAHAL and 3rd Appellant, THESELIM *inter alia* change of name from 'Messrs Theselim Jarina & Co' to 'Messrs Theselim Mohd Sahal & Co' and scope of liabilities.
5.	23.11.2005	Letter of confirmation from vendor's solicitors, Messrs Paul Cheah & Associates that the vendor's name had been registered on the original title of the Property.
6.	13.12.2005	Vendor's application to the Selangor State Authority for Consent to Transfer of the Property to the Respondents. Referred to in Pejabat Daerah Petaling's letter dated 25.01.2006.
7.	04.01.2006	Respondents' letter to the 1st appellant/SAHAL *inter alia* to terminate the Agreement, and to recover the deposit and all other monies paid to the vendor.
8.	12.01.2006	Letter of advice from 1st appellant/SAHAL in reply to respondents' letter dated 04.01.2006 *inter alia* advising the status of the Agreement and that there was no event of default warranting a termination. SAHAL enquired on status of respondents' loan. Receipt: 12.01.2006, 2.42am and initialised by 1st respondent.
9.	17.01.2006	Lodgment of Private Caveat by the respondents on the Property Referred to as an event in 1st appellant/SAHAL's letter dated 29.05.2006 to the respondents.
10.	25.01.2006	Letter from Pejabat Daerah Petaling *inter alia* granting Consent to Transfer the Property from the Vendor to the respondents.
11.	27.01.2006	Letter from 1st appellant/SAHAL to the respondents *inter alia* informing respondents that vendor had obtained consent to transfer and balance purchase price under the Agreement due to be paid within four months from 27.01.2006. SAHAL enquired on status of the respondents' loan.

12.	08.03.2006	Form 14A Memorandum of Transfer for the Property.
13.	09.03.2006	Application for adjudication of the Form 14A dated 08.03.2006. Referred to as an event in LHDN's Notis Taksiran dated 20.04.2006.
14.	22.03.2006	Letter from vendor's solicitors to 1st appellant/ SAHAL *inter alia* confirming the Completion and Extended Completion Dates for the Agreement, and stating that the vendor shall not grant any further extension of time after the expiry of the Extended Completion Date. Transmitted by fax to the respondents on 24.03.2006.
15.	24.03.2006	1st appellant/SAHAL forwards a copy vendor's solicitors' letter dated 22.03.2006 to respondents.
16.	31.03.2006	Valuation Report on the Property by PPC International Sdn Bhd for and on behalf of BCB in respect of the loan intended for the respondents.
17.	20.04.2006	LHDN Stamp Duty Notice for the Form 14A adjudicating the stamp duty *ad valorem* of RM60,000.
18.	10.05.2006	Letter from 1st appellant/SAHAL to respondents enclosing a copy of the LHDN Stamp Duty Notice dated 20.04.2006 to the respondents, and advising payment. Transmitted by fax to the respondents on 10.05.2006.
19.	15.05.2006	Letter from vendor's solicitors to 1st appellant/ SAHAL regarding the Completion and Extended Completion Dates, and conditions to be fulfilled by respondents for the Extended Completion Date.
20.	18.05.2006	Letter from 1st appellant/SAHAL to vendor's solicitors in reply to vendor's solicitors' letter dated 13.05.2006 regarding the respondents' obligations under the Agreement.
21.	22.05.2006	Letter from respondents to 1st appellant/SAHAL in respect of the progress of the Property transaction.
22.	26.05.2006	Deadline: Completion Date of the Agreement.
23.	29.05.2006	Letter from 1st Appellant/SAHAL to respondents in reply to the respondents' letter dated 22.05.2006, where the 1st appellant/SAHAL advised the respondents on their queries.
24.	31.05.2006	Letter from 1st appellant/SAHAL to respondents regarding the respondents' intention to appoint another solicitor to take over conduct of the property transaction.

25.	31.05.2006	Loan Offer Letter from Bumiputra Commerce Bank Berhad ("BCB") to Respondents ("2nd Loan Offer") Loan Amount: RM1,650,000.00 Property: Lot No. 1 Botanic Villa Jalan Kenyalang 11/6, Kota Damansara, 47810 Petaling Jaya, Selangor Darul Ehsan ("Property") respondents' Date of Acceptance: 01.06.2006
26.	01.06.2006	Respondents' acceptance of BCB's 2nd Loan Offer.
27.	13.06.2006	Letter from 1st appellant/SAHAL to respondents advising *inter alia* on the upcoming deadline of the Extended Completion Date and requesting funds for the payment of the LHDN Stamp Duty Notice.
28.	16.06.2006	Letter from 1st appellant/SAHAL to respondents advising *inter alia* on Extended Completion Date, no instructions from BCB or BCB's lawyers regarding loan facility, consequences of the respondents terminating the Agreement and payment of the LHDN Stamp Duty Notice. Transmitted by fax to the respondents on 16.06.2006, 12.45 pm.
29.	19.06.2006	Letter from 1st appellant/SAHAL to respondents confirming respondents' instructions: (a) Request further extension of three (3) months to settle balance purchase price (b) Willingness to pay late interest on balance purchase price for the extension (c) Stamp duty will be paid upon confirmation of extension from vendor (d) Joint inspection date determined after receiving extension from vendor
30.	19.06.2006	Letter from 1st appellant/SAHAL to vendor's solicitors requesting *inter alia*: (a) Request for extension of time to pay Balance Purchase Price as BCB had just approved respondents' loan on 31.05.2006. (b) Respondents' willingness to proceed with the transaction. Transmitted by fax to respondents on 20.06.2006, 9.44 am
31.	21.062006	1st appellant/SAHAL lodged a private caveat on the Property. Copy of Land Office Receipt transmitted by fax to respondents on 23.06.2006, 5.23pm.

32.	23.06.2006	See event of 21.06.2006.
33.	23.06.2006	Letter from vendor's solicitors to 1st appellant/SAHAL in reply to 1st appellant/SAHAL's letter dated 19.06.2006 *inter alia*: (a) Vendor refused to grant further extension of time to the respondents to complete the Agreement; (b) Vendor's instructions that the deposit shall be automatically forfeited upon the expiry of the Extended Completion Date.
34.	23.06.2006	1st appellant/SAHAL faxed vendor's solicitors' letter dated 23.06.2006 to the respondents.
35.	26.06.2006	Letter from 1st appellant/SAHAL to respondents requesting urgent instructions from the respondents.
36.	26.06.2006	Letter from 1st appellant/SAHAL advising *inter alia*: (a) The updated situation regarding the Agreement; (b) The options available to the respondents; (c) Request for instructions from respondents.
37.	26.06.2006	Letter from respondents to 1st appellant/SAHAL instructing *inter alia*: (a) Request for extension of time to complete the Agreement; (b) To inquire with BCB on status of loan; (c) Issue of forfeiture of deposit will be decided after vendor grants the extension; and (d) Vendor should return RM70,000 to respondents if vendor does not extend the Agreement.
38.	26.06.2006	Letter from 1st appellant/SAHAL to respondents confirming the respondents' instructions and advising *inter alia*: (a) In respect of the loan documents, 1st appellant had not received instructions from BCB and respondents were to liaise with BCB. (b) Entitlement to obtain refund of RM70,000.
39.	26.06.2006	Letter from 1st appellant/SAHAL to vendor's solicitors requesting *inter alia* respondents' request for extension of time to complete the Agreement according to the terms of the 1st appellant's letter dated 19.06.2006.

40.	26.06.2006	Deadline: Extended Completion Date of the Agreement.
41.	30.06.2006	Letter from Vendor's solicitors to 1st appellant/SAHAL *inter alia* informing: (a) Failure of respondents to pay Balance Purchase Price on 26.06.2006; (b) Forfeiture of deposit; (c) Termination of the Agreement; and (d) Demand for the withdrawal of respondents' Private Caveat lodged on 21.06.2006
42.	30.06.2006	Letter from BCB to 1st appellant/SAHAL instructing 1st appellant to prepare the loan documentations for the respondents and enclosing the following documents: (a) Original Agreement dated 10.01.2005; (b) Amended Letter of Offer dated 13.06.2006, (c) Amended Letter of Offer dated 30.06.2006, (d) Stamped Letter of Offer dated 31.05.2006, and (e) BCB's Security Documents.
43.	03.07.2006	Letter from 1st appellant/SAHAL to respondents enclosing Vendor's solicitors' letter dated 30.06.2006 (previously faxed on 30.06.2006 to respondents) and advising *inter alia*: (a) demand refund of RM70,000.00 upon withdrawal of private caveat; (b) request for urgent instructions from respondents
44.	11.07.2006	Letter from respondents to 1st appellant/SAHAL alleging *inter alia*: (a) Lack of advice over payment; (b) Withdrawal of private caveat only upon receipt of RM70,000.00 together with 10% interest daily from date of termination of Agreement.
45.	12.07.2006	Letter from 1st appellant/SAHAL to Vendor's solicitors *inter alia*: (a) Request for return of RM70,000 from Vendor to respondents; (b) Relayed respondents' instructions that the withdrawal of the private caveat is conditional upon payment of RM70,000 to the Respondents.

46.	13.07.2006	Letter from vendor's solicitors to 1st appellant/ SAHAL *inter alia*: (a) Vendor's remittance of the RM70,000 to vendor's solicitors as stakeholder; (b) Release of RM70,000 to respondents conditional upon withdrawal of the private caveat.
47.	14.07.2006	Letter from 1st appellant/SAHAL to respondents *inter alia* (a) Refuting respondents' allegations in Respondents' letter dated 11.07.2006; (b) Vendor's agreement to refund the RM70,000 to respondents upon withdrawal of private caveat; and (c) Request for urgent instructions from Respondents.
48.	14.07.2006	Letter from respondents to 1st appellant/ SAHAL *inter alia*: (a) Refusal to agree with vendor's condition for return of RM70,000; and (b) Request for confirmation on payment of RM70,000 by vendor to 1st appellant.
49.	14.07.2006	Letter from respondents to 1st appellant/SAHAL *inter alia*: (a) Request for advice on private caveat and protection of respondents' interest (b) Instructions not to withdraw private caveat
50.	17.07.2006	Letter from 1st appellant/SAHAL to respondents in reply to respondents' letter dated 14.07.2006 *inter alia*: (a) Refuting respondents' allegations; (b) Affirming that Agreement was terminated for failure to pay balance purchase price before expiry of Extended Completion Date (c) Request for instruction regarding the refund of the RM70,000 and removal of private caveat.
51.	18.07.2006	Letter from respondents to 1st appellant/SAHAL *inter alia*: (a) Request for written advice on queries posed; and (b) Demand for explanation on payment of late interest and failure to refund RM70,000 by vendor.

52.	18.07.2006	Letter from 1st appellant/SAHAL to respondents in reply to respondents' letter dated 18.07.2006 *inter alia* (a) Refuting respondents' allegations; (b) Notice that 1st appellant discharge as solicitors for the respondents due to respondents' allegations; (c) Request to respondents to directly liaise with vendor's solicitors.
53.	18.07.2006	Letter from 1st appellant/SAHAL to vendor's solicitors informing that the 1st appellant had discharged themselves from acting for the respondents.
54.	19.07.2006	Letter from 1st appellant/SAHAL to respondents *inter alia* (a) Advice on private caveat and request for appointment of another firm of solicitors to take over conduct.
55.	19.07.2006	Letter from vendor's solicitors to 1st appellant/SAHAL *inter alia*: (a) Confirmation that the cheque for RM70,000 was ready to be collected on the condition that the private caveat had been withdrawn.
56.	20.07.2006	Letter from 1st appellant/SAHAL to respondents *inter alia* to forward the vendor's solicitors letter dated 19.07.2006 to the respondents
57.	06.10.2006	Letter from Messrs Murali B. Pillai & Associates for the respondents to 1st appellant/SAHAL requesting for the particulars of private caveat and confirmation that the sum of RM70,000 is being held by them as stakeholders.
58.	19.07.2010	Letter from respondents to Bar Council's Disciplinary Board lodging a complaint against the 1st appellant/SAHAL.

The Plaintiffs' Claim And The Defendants' Defence

[11] The plaintiffs then filed the instant suit alleging negligence on the part of the defendants. It was not disputed that the first defendant's retainer was to "menyediakan dan mendrafkan perjanjian jual beli bagi pihak plaintif-plaintif". The substantive particulars of the defendants' negligence may be summarised as follows:

(i) failure to ensure that the SPA contained terms to protect the plaintiffs' interests in the transaction by incorporating comments by the plaintiffs and stipulating time frames for completion;

(ii) failure to comply with the plaintiffs' instructions to terminate the SPA;

(iii) failure to advise the plaintiffs on the relevant procedures for the property transaction; and

(iv) failure to protect the plaintiffs' interests and obtain instructions from the plaintiffs while dealing with the vendor, and by unethically discharging as solicitors for the plaintiffs when the vendor terminated the SPA and forfeited the plaintiffs' deposit.

[12] The plaintiffs also claimed that as a result of the defendants' negligence, they had suffered the following loss and damages:

(i) loss of investment on the property;

(ii) emotional distress during and after the property transaction and for failing to purchase the property; and

(iii) financial loss due to the forfeiture of the deposit.

[13] In their defence, the defendants denied the plaintiffs' claim of negligence on the grounds summarised as follows:

(i) the first and second defendants had reasonably prepared and implemented the SPA throughout the transaction;

(ii) the termination of the SPA was because of the plaintiffs' failure to make payment of the balance purchase price to the vendor;

(iii) the third defendant was not involved in the transaction and had never dealt with the plaintiffs.

Findings Of The High Court

[14] The High Court made a finding that the first defendant and the second defendant were in breach of their duty of care towards the plaintiffs. The grounds for such finding can be summarised as follows:

(a) The second defendant had failed to incorporate the plaintiffs' comments into the final SPA dated 10 January 2005 concluded between the vendor and the plaintiffs;

(b) The second defendant had failed to comply with the plaintiffs' instructions *vide* their letter dated 4 January 2006 to terminate the SPA;

(c) The first and second defendants had failed to prepare the loan documentations for the property transaction;

(d) The second defendant had failed to advise the plaintiffs regarding the progress of the transaction and had conducted the transaction negligently; and

(e) The third defendant was also found jointly and severally liable for damages arising from the first and second defendants' negligence as she was a partner in the first defendant firm.

The Instant Appeal

[15] Before us, the defendants argued that the plaintiffs' allegations of negligence were triggered only after the occurrence of the following crucial events:

(a) Refusal by the vendor to grant a further extension of time to the plaintiffs after the expiry of the extended completion date on 26 June 2006;

(b) The plaintiffs' failure to secure a loan facility from the plaintiffs' bank on terms acceptable to the plaintiffs within the completion and the extended completion date; and

(c) Termination of the SPA by the vendor and forfeiture of the 10% deposit and other monies paid to the vendor under the SPA.

[16] It was further contended that there could be no dispute that the termination of the SPA was due to the plaintiffs' failure to pay the balance purchase price under the SPA within the completion and extended completion dates. The plaintiffs' failure to make payment was because the plaintiffs had failed to secure a loan facility to finance the purchase of the property before the expiry of the completion and extended completion dates of the SPA. It was submitted that the contemporaneous documentary evidence showed that the plaintiffs' allegations of negligence and the High Court's findings against the defendants are not sustainable, and as such the High Court judgment should not stand.

[17] In this regard, it may be convenient to consider the findings of the learned trial judge on the material issues to determine if the criticisms levelled at the learned judge's findings are valid and justified. From a perusal of the grounds of judgment it is clear that the crux of the learned judge's findings was two-fold. The first material finding of negligence pertains to the failure of the first defendant, and the second defendant in particular, in incorporating the plaintiffs' comments into the final SPA dated 10 January 2005. This is how the learned judge crafted the finding (at para. 114):

> The 2nd defendant (SAHAL) is negligent for not giving PW1 and his wife the opportunity to read the agreement before he instructed them to sign the agreement. PW1 and his wife signed the agreement under the assumption that their comments had been incorporated into the agreement.

[18] The second material finding is with respect to the failure of the second defendant to terminate the SPA as per the instructions contained in a letter dated 4 January 2006. This is what the learned judge said (at para. 128):

> The 2nd defendant (SAHAL) is also negligent when he did not contact the vendor to inform him of PW1's wish to terminate the agreement and to obtain a refund of the deposit that had been paid. Instead the 2nd defendant (SAHAL) allowed the matter to be prolonged until he received the letter of termination of the agreement from the vendor's solicitors.

[19] These two material findings of negligence are related in the sense that they refer to matters that occurred before the plaintiffs were informed that the vendor had obtained the consent to transfer the said property from the Selangor State Authority. The complaint appears to be that the plaintiffs were deprived of the opportunity to terminate the SPA by, first, the failure of the defendants to insert the appropriate clauses as suggested by the plaintiffs and, second, the failure later on by the defendants to terminate the SPA as instructed by letter.

[20] In this respect, the conduct of the plaintiffs after receipt of the notice that the consent to transfer has been obtained is significant. The contemporaneous documents showed that the plaintiffs were no longer interested in the termination of the SPA but instead took positive steps to proceed with the SPA. In this connection, the plaintiffs commissioned and prepared a valuation report for the property in compliance with the bank's loan offer dated 25 November 2004. Instructions to obtain a further extension of time were given to the defendants by the plaintiffs which extension was obtained. The evidence also disclosed that the plaintiffs' financiers had issued amended offer letters with one dated 13 June 2006 and the final one dated 30 June 2006. In short, there was a clear change of stance and there were no complaints whatsoever about the defendants' failure to incorporate the plaintiffs' comments or to terminate the SPA as the focus of the plaintiffs shifted to getting the best loan terms from their financiers.

[21] It seems to us that having elected to proceed with the SPA, the plaintiffs are estopped from alleging that the defendants were negligent for not complying with their instructions to terminate the SPA. It certainly appeared that only after a further extension of time was refused by the vendor that allegations of failure to put in the necessary terms and the failure to terminate the SPA were mounted against the defendants.

[22] In our view the plaintiffs were approbating and reprobating in adopting such an approach. The law does not permit this. In *Vershures Creameries Ltd v. Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, Scrutton LJ elucidated the principle as follows (at p. 612):

> The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that that it is valid, and then turn around and say it is void for the purposes of securing some other advantage. That is to approbate and reprobate the transaction.

[23] Now having decided to affirm the contract and taking steps to conclude the said contract by obtaining the necessary financing, the plaintiffs are deemed to have abandoned their right by making such an election. In this respect, the learned authors of *Chitty on Contracts*, vol 1, 31st edn, had this to say (at para. 24-003):

> Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have affirmed the contract. He will not be held to have elected to have affirmed the contract unless, first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract.

[24] The upshot of the circumstances set out in the foregoing means that the plaintiffs cannot now fall back on the alleged negligence of the their solicitors, the first defendant, to claim for subsequent losses that arose due to the plaintiffs' election to continue with the contract.

[25] The next finding of the learned judge, which was assailed by the defendants, was in relation to the failure of the defendants to prepare the loan documents. At para. 131 of the judgment the learned judge observed:

> The 2nd defendant (SAHAL) was also negligent because he knew that the 1st plaintiff and his wife had obtained a pre-approved loan from the Bank for a sum of RM2.2 million to purchase the property. Yet he did not prepare the loan documentation for the 1st plaintiff and his wife to sign until the 1st offer of the loan had lapsed.

And further at para. 145:

> It is clear from paragraph 5(3) of the 2nd letter of offer that as on 31 May 2006, which was still within the extended completion period for the agreement, the 1st plaintiff and his wife had obtained the Bank's approval for the execution of a new loan agreement within 3 (three) months from the date of the letter by one of the Bank's panel of lawyers, who is none other than the 2nd defendant. But again, the 2nd defendant (SAHAL) did not prepare the loan agreement for the execution of the 1st plaintiff and his wife to enable the Bank to disburse the loan monies to the 1st defendant as the stakeholder of the 1st plaintiff and his wife or directly to the vendor's financier to redeem the property ...

[26] In this regard, the first criticism levelled by the defendants/appellants of the learned judge's finding is that this allegation of negligence was not pleaded. It is trite law that parties must confine their case to the pleadings. This is more a rule of fair play in that parties have clear notice of the issues that are going to be adjudicated so that there is no prejudice of a party being taken by surprise and therefore being unprepared to deal with newly sprung issues. The other advantage is that the court's time is not wasted as the issues for determination are identified at the outset during case management by a

consideration of the pleadings. So it is imperative that parties be bound by their pleadings (see also *Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd* [2014] 5 CLJ 533; [2015] 1 MLJ 284; *Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd* [2016] 10 CLJ 112; [2014] 2 MLJ 322 and *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196).

[27] A perusal of the pleadings indicates that this finding of the learned judge was based on an unpleaded case. In our view, such finding had occasioned a miscarriage of justice and the decision in this regard must be set aside.

[28] In any event, there was merit in the argument that the defendants could not proceed with the loan documentation unless instructed by the plaintiffs' financiers even though the first defendant was in the bank's panel of solicitors. In this context, it is important to appreciate, and which the learned judge overlooked, that in preparing the loan documents, the defendants will be acting for the bank and not the plaintiffs. As it turned out, the bank's instructions to the first defendant to prepare the loan documents came on 30 June 2006 after the expiry of the extended completion date of the SPA. For this reason as well, this ground could not form a basis for negligence against the defendants.

[29] The final finding which was also attacked was with regard to the failure by the defendants to advise the plaintiffs as to the progress of the transaction and also for unprofessional conduct. A glaring omission, which appeared to have been overlooked all round, was that no evidence was adduced to show the appropriate standard of care, competence and diligence which the defendants should be held up to in conveyancing practice. A solicitor, like all professionals, has a duty to exercise reasonable degree of care and skill expected of a competent and reasonably experienced solicitor. In exercising reasonable care and skill, one must act with integrity and diligence (see *Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co* [2010] 1 CLJ 913; [2010] 1 MLJ 284).

[30] Thus, whether the first defendant, and in particular the second defendant, who was the solicitor handling the transaction, were negligent may be determined by a consideration of the following questions:

(i) whether the standard of care practised by the second defendant was the same standard of reasonably competent solicitors in conveyancing practice; and

(ii) whether the second defendant had acted with diligence in exercising the reasonable care and skill expected to assist the completion of the SPA.

[31] As alluded to earlier, it is unfortunate that no evidence was led as to the conveyancing practice in existence at the time. The learned judge appeared to rely on the evidence of the plaintiffs who were quite obviously not solicitors professing expertise in the field of conveyancing practice. The defendants, on the other hand, had the evidence of the third defendant who was a senior conveyancing practitioner. She testified that the procedure

applied by the second defendant was in accordance with the accepted standards in conveyancing practice. Although she was an interested witness, her testimony was the best available evidence before the court. There was, at least, no material before the court to rule that the second defendant was guilty of unprofessional conduct. The finding of negligence in this context was therefore unfortunate.

[32] In this respect as well, we are compelled to note that there was no inquiry as to whether it was the first defendant's breach of duty which led to the losses sustained. The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. In other words, was the defendant's act the effective cause of the harm suffered by the plaintiff? In this respect, the courts look to the test of causation known commonly as the "but for" test (see *Elizabeth Chin Yew Kim & Anor v. Dato' Ong Gim Huat & Other Appeals* [2017] 2 CLJ 274; [2017] 1 MLJ 328; *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors & Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29 and *Ngan Siong Hing v. RHB Bank Bhd* [2014] 3 CLJ 984; [2014] 2 MLJ 449).

[33] The "but for" test simply means that "but for" the defendant's negligent act, the harm would not have occurred. Applying the "but for" test in the present case, the question is whether the plaintiffs' damage would have accrued but for the defendants' negligence. In our view, the proximate cause of the plaintiffs' losses is the failure of the plaintiffs to obtain the financing and to settle the balance purchase price within the agreed period. That had nothing to do with the defendants as solicitors. It was indeed a matter entirely within the control of the plaintiffs and the bank. In other words, there was no nexus between the exercise of care and skill by the defendants as solicitors to the granting or otherwise of the loan facility. As such, it must follow that the plaintiffs have failed, in this respect, to establish liability on the part of the defendants.

Conclusion

[34] In the circumstances, and for the reasons we have given, we were of the view that the decision of the High Court was plainly wrong. We were persuaded that there has been a clear case of misdirection by the learned trial judge on the issue of liability. As a result, appellate intervention was warranted. Accordingly, we allowed the appeal and set aside the order of the High Court with costs here and below fixed at RM50,000 subject to payment of allocatur fees. We also ordered the refund of the deposit to the appellants/defendants.